

THE STATE OF SOUTH CAROLINA

In The Court-Of Appeals

APPEAL FROM GREENVILLE COUNTY

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Court of Common Pleas

JUL 15 2015

Robin B. Stilwell, Circuit Court Judge

SC Court of Appeals

Case No. 2014-002201

Señor Wraps, Inc.....Appellant—Respondent,

v.

E. Kwang Kim, as trustee of the E. Kwang
Kim Revocable Trust dated January 5, 2007,
and E. Kwang Kim..... Respondents—Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR BY DEVIATING FROM CONTRACT TERMS AND SETTING A RETROSPECTIVE DATE FOR VALUATION OF THE OPTIONED PROPERTY?

STATEMENT OF THE CASE

This matter derives from a dispute between Respondent, Señor Wraps, Inc. (“Tenant”), and Appellants, E. Kwang Kim, as trustee of the E. Kwang Kim Revocable Trust dated January 5, 2007, and E. Kwang Kim (collectively “Landlord”), concerning the interpretation and scope of a written option to purchase real property located at 10 S. Main Street, Greenville, South Carolina, dated April 14, 2007 (the “Option”). Tenant, the lessee of certain ground floor space at 10 S. Main Street, Greenville, South Carolina (the “Leased Premises”) filed suit against Landlord on January 11, 2013 in the Court of Common Pleas for Greenville County, South Carolina seeking a declaratory judgment (as to the extent of realty) and specific performance of the Option. (Pl.’s Compl.) Landlord timely answered, asserting various affirmative defenses, and counterclaimed for declaratory judgment as to the extent of property covered by the Option. (Defs.’ Answer & Countercl.) More specifically as to the dispute over the scope of the Option, Tenant alleged that the Option allowed for purchase of both the Leased Premises and the floor above, while Landlord maintained the Option was limited to the Leased Premises.

The matter came before the Honorable Robin B. Stilwell, Circuit Judge, for non-jury trial on June 12, 2014. On July 8, 2014, the trial court provided a summary of its ruling and requested that Landlord’s counsel prepare a proposed order. (Ct.’s Corresp. of July 8, 2014.) The trial court issued an initial Order, executed July 29, 2014 and entered August 5, 2014. (Order of the Ct. entered Aug. 5, 2014.) Therein, the trial court found

and declared that the scope of the Option was limited to the Leased Premises—being the ground floor only. (See Order of the Ct. entered Aug. 5, 2014, pg. 8.)

Tenant filed a Rule 59 Motion to Alter or Amend Judgment on August 15, 2014. (See Pl.'s Rule 59 Mot. to Alter or Amend J.) A hearing on Tenant's post-trial motion was held on September 3, 2014, and Judge Stilwell denied Defendant's request to alter prior findings of fact and conclusions of law. (See Order of the Ct. entered Sept. 8, 2014.) Judge Stilwell did, however, supplement his prior ruling as to performance under the Option. Specifically, the trial court ruled that valuation of the property, by appraisal, shall be determined retrospectively—as of November 30, 2012—in the event Tenant were to move forward with exercise of the Option. (See Order of the Ct. entered Sept. 8, 2014.) The trial court's order on Tenant's post-trial motion was executed by Judge Stilwell and entered on September 8, 2014. Tenant filed a Notice of Appeal on October 8, 2014, and Landlord timely filed its Notice of Cross-appeal on October 9, 2014.

On July 13, 2015, the initial briefing deadline for Tenant's Appeal, Tenant communicated to Landlord its intention to withdraw Tenant's appeal.

STATEMENT OF FACTS

The Leased Premises are contained within a two-story building (the "Building"), which is owned entirely by Landlord. The Leased Premises bears a storefront address of 10 S. Main Street, Greenville. Immediately adjacent to the Leased Premises is an additional leased space with the storefront address of 12 S. Main Street. Critically, the upstairs or second floor of the Building is only accessible from 12 S. Main Street. In other words, the Leased Premises consist of discrete and isolated space on the ground floor of the Building, and the leased property generally identified as 12 S. Main Street

includes the remainder of the ground floor and all of the space on the second floor of the Building. The Option confronts these circumstances by requiring as follows:

In order that [Tenant] may consummate its Option to purchase the [Leased Premises], said [Leased Premises] will need to severed from the Master Parcel—by subjecting the Master Parcel to the condominium form of ownership.... [Tenant] agrees to bear the cost of such severance including but not limited to all capital expenditures necessary to accomplish physical severance and building code compliance, legal fees and the cost of plot plans, floor plans, survey and architectural renderings necessary to subject the Master Parcel to the condominium form of ownership. The condominium master deed shall be prepared by an attorney approved by Landlord, and the master deed itself shall be subject to complete review and approval of Landlord. In the event that Tenant fails to deliver a draft master deed (in recordable form with all exhibits attached) and all other documents or construction contracts reasonably necessary to accomplish severance within forty-five (45) days following Option exercise, the Option shall automatically be terminated and of no further force or effect.

(See Pl.'s Ex. 1, ¶ 3.)

ARGUMENT

I. THE TRIAL COURT'S DECLARATION OF A NOVEMBER 30, 2012 VALUATION DATE CONTRADICTS THE WRITTEN AGREEMENT OF THE PARTIES AND CONSTITUTES AND ERROR OF LAW.

The lower court erred by setting a valuation date that that deviates from explicit terms of the Option. It is well settled in South Carolina that “[i]t is not the function of the court to rewrite contracts for parties.” Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). In the present case, the Option provides as follows:

In the event [Tenant] elects to exercise the Option, [Tenant] shall pay a purchase price for the Property (the “Purchase Price”) equivalent to the then fair market value of the Property as severed from the Master Parcel (the “Market Value”). For purposes of ascertaining the said Market Value, Landlord and Tenant shall mutually select a single appraiser of not less than seven (7) years’ experience and properly licensed and practicing in the Greenville, South Carolina area.

(See Pl.'s Ex. 1, ¶ 4.) From this language, the valuation process is dependent upon: (1) proper exercise of the Option; (2) severance of the Leased Premises from the rest of the Building; and (3) selection of a mutually agreeable appraiser. Admittedly, Tenant gave initial notice of its intent to exercise the Option on November 30, 2012; however, Tenant's initial notice declared a right to purchase more property than was covered by the Option. (See Def.'s Ex. 10.) In this initial notice, Tenant's legal counsel unequivocally claims that "the Option being exercised covers the Cantinflas restaurant space on the street level, the basement directly below it, and the attic directly above it." (See Def.'s Ex. 10.) Because Tenant's initial notice of exercise was defective, the Court erred by assigning a valuation date of November 30 2012.

A. The trial court's declaration of a November 30, 2012 valuation date is improper due to Tenant's consistently defective attempts to exercise the Option.

Tenant has consistently failed to provide an unqualified notice of Option exercise as to the Leased Premises; therefore, commanding a retrospective valuation date is error. In order to perfect exercise of an option in South Carolina, the law requires exacting compliance with the option terms. See Ingram v. Kasey's Assocs., 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000). Moreover, "It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee." Id. Even outside the context of these legal standards, Tenant's initial and subsequent attempt did not constitute a valid exercise of the Option. The trial court recognized problems with Tenant's attempted exercise by declaring that "[Tenant] shall have thirty 30 days from the date of execution of this Order to perfect exercise of the Option in accordance with the terms of the Option." Abiding by this directive—but still clinging to the argument for

an enlarged purchase right—Tenant’s attorney tendered a second notice of exercise dated August 27, 2014, stating “Pursuant to the Option, and Judge Stillwell’s Trial Order, Señor Wraps, Inc., hereby exercises its Option to buy all the Property.” (See Pl.’s Corresp. of Aug. 27, 2014)[emphasis in original].) Because Tenant’s second notice of exercise is defective (by continuing to contest the scope of realty to which the Option applies), the Court erred by assigning a valuation date of November 30, 2012.

B. The trial court’s declaration of a November 30, 2012 valuation date is improper due to Tenant’s failure to timely sever the Leased Premises from the remainder of the Building as required by the Option.

Tenant failed to comply with the terms of the Option requiring it to provide condominium documents within forty-five (45) days following Option exercise; therefore, commanding a retrospective valuation is error. Again, South Carolina law requires exacting compliance with the option terms. See Ingram, 340 S.C. at 108, 531 S.E.2d at 292. Unequivocally, the Option calls for appointment of a mutually acceptable real estate attorney and delivery of condominium documents within forty-five (45) days of the Option exercise. (See Pl.’s Ex. 1, ¶ 3). So important was this element of timing that the parties agreed a failure of such delivery would lead to outright termination of the Option. (See Pl.’s Ex. 1, ¶ 3). It is uncontested that no condominium documents were provided in 2012. Likewise, no condominium documents were provided in 2013. (See Def.’s Ex. 11; Trial Tr. 153:10-11.) Finally, in late 2014, Landlord supplied a form of master deed which has become the proposed instrument for severance of the Leased Premises. (See Appraisal Engagement Letter dated May 13, 2015). It constitutes error for the trial court to assign an Option valuation date of November 30, 2012 and then depart

from Option contract requirements regarding the subsequent delivery of condominium documents.

C. *The trial court's declaration of a November 30, 2012 valuation date is improper due to Tenant's failure to supply a mutually acceptable appraiser.*

Setting aside Tenant's failure to properly exercise the Option and Tenant's failure to sever the Leased Premises so that it *could* be appraised and sold, a retrospective 2012 valuation date is further in error based on the fact that Tenant and Landlord did not agree on a an appraiser in 2012. Once again the *Ingram* case provides support: "[T]he transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract." *Ingram*, 340 S.C. at 108, 531 S.E.2d at 292. In the present case, the Option declares that the purchase price shall be established by an appraisal of the Market Value of the Leased Premises "as severed from the Master Parcel." (See Pl.'s Ex. 1, ¶ 4). It would be impossible for the appraisal to proceed without first defining the condominium to be bought. As such, it is not surprising that the parties did not actually select an appraiser until after the proposed condominium documents were submitted and reviewed, well after the trial of this case. Because Tenant and Landlord had not agreed on a mutually acceptable appraiser, the Court erred by assigning a valuation date of November 30, 2012.

II. THE TRIAL COURT'S DECLARATION OF A NOVEMBER 30, 2012 VALUATION DATE CONTRADICTS CONTROLLING EQUITABLE PRINCIPLES.

On September 8, 2014 that trial court ruled that the purchase price for the Leased Premises should be established as of November 30, 2012. The trial court's explained this

ruling by declaring that “[t]he original exercise of the Option was frustrated by and through the controversy which is the subject matter of this litigation.” (Ct. Order entered Sept. 8, 2014.) The trial court’s retrospective valuation decree imposes upon Landlord all detriment associated with protracted litigation initiated by Tenant and gives no regard for controlling equitable principles. Initial attempts to exercise the Option were frustrated because Tenant demanded to purchase more than the Leased Premises. Initial attempts to exercise the Option were frustrated because Tenant failed supply condominium documents. Initial attempts to exercise the Option were frustrated because Tenant failed to propose a mutually acceptable appraiser. A litigant that seeks equity must do equity. See Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994); see also Shumaker v. Shumaker, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959)(“Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties.”). It is, therefore, inequitable that Tenant should receive a grant of specific performance when Tenant, itself, has failed to specifically perform. The retrospective valuation deprives Landlord of several years’ worth of real property appreciation.

Commanding a retrospective valuation constitutes an unfair penalty to Landlord who has done nothing but resist Tenant’s attempted/unlawful expansion of Option rights and insist on strict adherence to contract. From an equitable perspective, the successful party in the underlying litigation should not suffer such a penalty. Any number of equitable maxims support this position. For example, “equity abhors a forfeiture” (in this case several years’ worth of property appreciation). Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). “Equity aids the vigilant,

not those who sleep on their rights.” Eldridge v. Eldridge, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012). Tenant could have purchased the Leased Premises in 2012, thereby avoiding the cost of appreciation, while still suing for the right to purchase the upper floor. Tenant’s decision to proceed in an all-or-nothing fashion should not be taxed as a loss to Landlord. Finally, “equity delights to do justice and not by halves.” Coleman v. Coleman, 208 S.C. 103, 108, 37 S.E.2d 305, 313 (1946). In the present case, the trial court has commanded a retrospective appraisal, on the basis of frustrated intentions. This ruling robs Landlord of property appreciation, without any offsetting recognition or award of interest on retrospective purchase money—had it been paid in 2012.

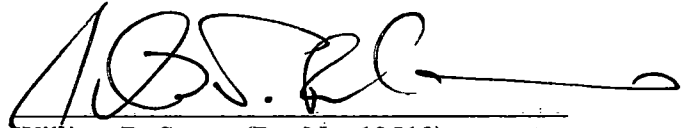
CONCLUSION

Accordingly and based upon the foregoing, this honorable Court should reverse the trial court and declare that exercise of the Option was not perfected on November 30, 2012 and that a retrospective valuation is therefore improper.

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Respectfully submitted,

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Robin B. Stilwell, Circuit Court Judge

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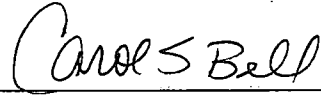
PROOF OF SERVICE

The undersigned employee of the law offices of Smith Moore Leatherwood LLP, attorneys for Respondents—Appellants, does hereby certify that service of the **Initial Brief of Respondents—Appellants** was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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This the 13th day of July, 2015.

Handwritten signature of Carol S. Bell in cursive script.

Carol S. Bell
Legal Assistant/Secretary

July 13, 2015

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Senor Wraps, Inc. v. E. Kwang Kim, et al.*
Case No.: 2014-002201
SML File No.: 09125129.000001

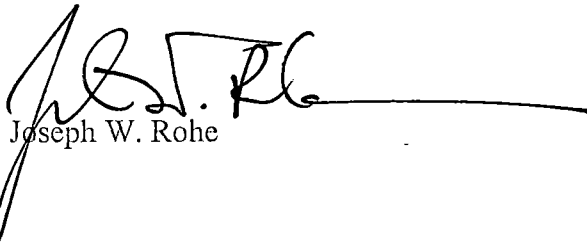
Dear Honorable Ms. Kitchings:

Enclosed herewith please find the original and one (1) copy each of the Initial Brief of Respondents—Appellants and Respondents—Appellants Designation of Matters to be Included in the Record on Appeal along with Proofs of Service in the matter above-referenced. I would kindly ask that you return a filed copy in the self-addressed, stamped envelope enclosed.

Should you have any questions or concerns, please feel free to contact me at your convenience. With best wishes and kindest regards, I remain

Very truly yours,

SMITH MOORE LEATHERWOOD LLP

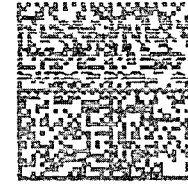


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JWR/csb
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